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IMMIGRATION REFORM: IS RESTRUCTURING THE ANSWER?

BY

ELO-KAI OJAMAA

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USAWC STRATEGY RESEARCH PROJECT

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ABSTRACT

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In its September 1997 final report, the U.S. Commission on Immigration Reform proposed that the U.S. Immigration and Naturalization Service (INS) be abolished because one agency cannot both effectively enforce the immigration laws and fairly adjudicate immigration benefits. Finding that the INS, as an agency under the Department of Justice, has an enforcement bias harmful to benefits adjudication, the Commission recommended that all benefits adjudication be done by the Bureau of Consular Affairs at the Department of State and that a new Department of Justice agency be created for immigration law enforcement. On balance, the evidence shows that INS does emphasize enforcement at the expense of adjudication but that this stems more from its position in the Department of Justice than intrinsic mission conflict and that fraud is an ever present element of adjudication. As a practical matter, the two cannot be separated. Thus, the problem raised by the Commission may be better solved by turning INS into an independent agency rather than by dismemberment.

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HOW TO FIX THE IMMIGRATION MESS?

GENERAL NATURE OF THE IMMIGRATION PROBLEM

President Clinton begins his May 1997 A National Security Strategy for a New Century report to Congress by stating:

"Protecting the security of our nation - our people, our territory and our way of life - is my foremost mission and constitutional duty."¹ With this statement, the President reaffirms the universally held principle that a country has the sovereign right and duty to protect its territorial integrity and borders. Indeed, the ability to control its borders is in some sense a measure of a country's sovereignty and is thus a vital national security issue.² The fact that the President's National Security Strategy report, a document which focuses on defusing external threats to security and economic well-being before they reach U.S. borders, does not specifically discuss border control and security does not diminish its intrinsic importance.³

Early in his first administration, President Clinton, while lauding the contribution of immigrants to American life, stressed that "we can't afford to lose control of our borders or to take on new financial burdens at a time when we are not adequately providing for ...our own people. Therefore, immigration must be a priority for this administration."⁴ While the President asserted that we must not lose control over our borders, there is a growing public perception in the country that we already have

lost control in that our government is unable to either stem the flow of illegal migrants across our borders or to effectively and fairly manage legal immigration and naturalization.⁵ Despite the President's declaration that protection of "our people, our territory and our way of life," is his mission and duty (see above), the fear is that we are in danger of losing all three.

Review of the literature reveals that this public perception and accompanying anxiety has been growing for the past several decades. In 1986, after many years of debate, Congress passed the Immigration Reform and Control Act to finally bring the situation under control by taking away the illegal migration magnet of jobs by imposing sanctions on those who employ illegal aliens and by offering lawful immigrant status to those here illegally under an amnesty program. Today, ten years later, after more than 2.7 million illegal aliens (of an estimated 3 million population) were granted lawful immigrant status, the current illegal alien population in the country is estimated to be about 4 million, with another 300,000 being added annually.⁶ This is not the outcome predicted when the Act was adopted in 1986.

U.S. immigration experts and commentators generally lay the blame for this at the door of the U.S. Immigration and Naturalization Service (INS), the federal agency under the Department of Justice, charged with the primary responsibility for controlling U.S. borders and implementing and enforcing

immigration policy and law. These experts regularly take INS to task for its inability to control the border and to removal illegal and criminal aliens from the country, for its failure to process immigration and naturalization petitions and asylum requests efficiently, courteously and without inordinate delays, as well as for having allowed terrorists and criminals into the country and improperly having given them immigrant status and even citizenship.⁷

PROPOSAL TO RESTRUCTURE IMMIGRATION ADMINISTRATION

Often described as ineffective and incompetent, embattled, overwhelmed, and demoralized, the INS and immigration reform has been studied and restudied by some twenty-five commissions and congressional committees over the last 65 years.⁸ Most recently, the U.S. Commission on Immigration Reform (herein after the Commission), was established by the Immigration Act of 1990 as a bipartisan expert commission to study various aspects of immigration policy and to make recommendations for improvements.⁹

The Commission issued its final report on September 30, 1997. In addition to making numerous recommendations for substantive immigration reform, the Commission stated:

The immigration system is one of the most complicated in the federal government bureaucracy. In some cases, one agency has multiple, and sometimes conflicting, operational responsibilities. ...Some of the agencies that implement the immigration laws have so many responsibilities that they have proven unable to manage all of them effectively. Between Congressional mandates and administrative determinations, these

agencies must give equal weight to more priorities than any one agency can handle. Such a system is set up for failure and, with such failure, further loss of public confidence in the immigration system.¹⁰

As a result of these findings, the Commission recommended that the INS be abolished and that the administrative structure for implementing the country's immigration laws be reorganized.

The Commission found that "Immigration law enforcement requires staffing, training, resources, and a work culture that differs from what is required for effective adjudication of benefits or labor standards regulation."¹¹ Concluding that one agency, the INS, cannot effectively carry out two conflicting missions, law enforcement against and benefits adjudication for the same population, it proposed that these functions be separated and assigned to three different federal agencies:

1. the law enforcement mission to a new Bureau of Immigration Enforcement in the Department of Justice having equal status with the Federal Bureau of Investigation;
2. the benefits adjudication mission to an expanded Bureau of Consular Affairs in the Department of State (renamed the Bureau for Citizenship, Immigration, and Refugee Admissions); and
3. the labor standards regulation mission to an Employment Standards Administration in the Department of Labor.¹²

Under the Commission's proposed restructuring, the Justice Department's Bureau of Immigration Enforcement would be responsible for patrolling the borders to prevent illegal entry,

conducting inspections of individuals seeking entry into the United States at ports of entry, and investigating, apprehending, and removing illegal aliens from the country.¹³ The State Department's Bureau of Citizenship, Immigration, Refugee Admissions would take over the adjudication of all petitions and applications from aliens for immigrant, nonimmigrant, and refugee status as well as for asylum and naturalization to citizenship.¹⁴ The Labor Department's Employment Standards Administration would be responsible for verifying alien work authorizations and employer claims on petitions to hire nonresident alien workers and to investigate and enforce penalties against employers who do not verify the legal employability of their workers as required by current law.¹⁵

FRAMEWORK FOR ASSESSING THE COMMISSION'S PROPOSAL

Before the Commission's restructuring proposal can be meaningfully assessed, it must be placed in context. Some familiarity with the evolution of U.S. immigration law and policy, the INS, and the Department of State's Bureau of Consular Affairs is necessary. Thus, this paper will first present a brief historical overview of the development of U.S. immigration law and policy. Next, turning to the INS, after a short summary of its evolution, the position of the Service within the Department of Justice, its mission, and current structure will be described. An analogous brief description of the Bureau of

Consular Affairs will follow. The paper will then review the literature as it pertains to the Commission's rationale and conclude the background presentation with a review of reactions of U.S. immigration experts, the executive branch and Congress to the proposal.

With the background context thus laid out, the paper will then assess the merits of the Commission's finding that one agency, the INS, cannot both enforce the immigration law and adjudicate benefits and its recommendation that a new Department of Justice Bureau should be tasked exclusively with enforcement and that benefits adjudication should be consolidated in the Bureau of Consular Affairs at the Department of State. Finally, conclusions will be presented as to whether the Commission's restructuring proposal is the answer to immigration reform. This will be followed by a plausible recommendation.

THE BACKGROUND CONTEXT FOR THE COMMISSION'S PROPOSAL

U.S. IMMIGRATION POLICY AND LAW

With the exception of the Alien Act in force from 1798 to 1800, the United States -- being a country very much dependent on immigrants to populate and meet the labor demands of its expanding territory and country -- had no immigration laws until 1875. From 1875 to 1917, Congress, in response to public pressure from the states and the labor movement, enacted a number

of laws barring the admission of certain types of individuals (e.g., the Chinese, criminals, prostitutes, lunatics, idiots, paupers, polygamists, illiterates, chronic alcoholics, and people with contagious diseases).¹⁶ To these "qualitative" restrictions on immigration, Congress began adding "quantitative" ones with the Quota Law of 1921, intended to maintain the nation's ethnic composition by restricting immigration from Europe but not from independent Western Hemisphere countries.¹⁷

Since 1921, Congress has frequently tinkered with the immigration laws (adding and deleting qualitative restrictions and modifying the applicability and nature of the quantitative ones) and has passed consolidating omnibus legislation from time to time. The current law, however, still reflects these two broad operational objectives, to preclude certain undesirable types of immigrants and to limit the total numbers.¹⁸

While not specifically articulated in the U.S. immigration laws, the Commission states that the broad, commonly shared, overarching goal of these laws is to establish:

a legal immigration system that strives to serve the national interest in helping families to reunify and employers to obtain skills not available in the U.S. labor force; a refugee system that reflects both our humanitarian beliefs and international refugee law; and an enforcement system that seeks to deter unlawful immigration through employer sanctions and tighter border controls.¹⁹

INS: EVOLUTION, POSITION, AND STRUCTURE

The Immigration and Naturalization Service has not always been in the Department of Justice. It began as the Office of the Superintendent of Immigration in the Treasury Department in 1891. In 1903, it was transferred to the Department of Commerce and Labor and renamed the Bureau of Immigration. The naturalization function was added to its work in 1906. Then in 1940, on the eve of World War II in order to better control aliens, it was moved to the jurisdiction of the Department of Justice.²⁰

Turning to its position and status within the Department of Justice, INS is one of eight major agencies in the Department, ranging from the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) to the Offices of U.S. Attorneys.²¹ The over-arching mission of the Department of Justice, as stated in its recently issued strategic plan for 1997-2002, is:

to enforce the law and defend the interests of the U.S. according to the law, provide Federal leadership in preventing and controlling crime, seek just punishment for those guilty of unlawful behavior, administer and enforce the Nation's immigration laws fairly and effectively and ensure fair and impartial administration of justice for all Americans.²²

The strategic plan structures implementation of this mission by setting out seven functional areas, beginning with investigation and prosecution of criminal offenses and placing immigration fourth on the list, between enforcement of federal

laws and detention and incarceration.²³ While not expressly laid out in priority order but reflecting status inside the Department, the plan characterizes investigation and prosecution of criminal offenses, covering the functions of the FBI, DEA, and U.S. Attorneys, as: "a primary [Department of Justice] responsibility."²⁴ In contrast, administration of immigration is described as: "one of our most important duties."²⁵ Thus, INS is not involved in carrying out the Department's primary responsibilities. Further confirming the its relatively low status, the head of INS does not report to the head of the Department of Justice, the Attorney General.²⁶

Finally, moving briefly to its structure, INS has consistently divided its operations along functional lines: enforcement and examinations.²⁷ The Enforcement Branch includes the Border Patrol (which is to prevent illegal border crossing between ports of entry), and Investigations, Intelligence, and Detention and Deportation (which work together to find, detain, and deport illegal aliens for the interior of the country). The Examinations Branch, charged with adjudicating immigration benefits, is split into Inspections (with responsibility over legal admission of aliens and citizens into the country at ports of entry), and Adjudications and Nationality (with responsibility over determining eligibility for immigrant status and citizenship.).²⁸ In sum, although transferred to the Department

of Justice, which is primarily focused on criminal law enforcement in order to give priority specifically to law enforcement against aliens, INS does structurally separate its law enforcement and benefits adjudication missions.

BUREAU OF CONSULAR AFFAIRS: EVOLUTION, POSITION, AND STRUCTURE

To bolster its recommendation that the benefits adjudication functions be transferred to the Bureau of Consular Affairs in the Department of State, the Commission notes that the Department already has "...significant immigration, refugee, and citizenship duties."²⁹ This immigration mission started in 1917 when the State Department's consular officers abroad were given visa issuance responsibility administratively as a war time measure to prevent the arrival of enemy aliens at our ports. This administrative decision received legislative sanction with the Entry and Departure Controls Act of 1918 which gave the President the power to control the entry and exit of individuals threatening to the public safety during war or national emergency.³⁰ Under this Act, consular officers were directed to issue visas only to those who had "'a reasonable necessity for entering the United States' and that such entry was 'not prejudicial to the interests of the United States.'"³¹

It was not until the Immigration Act of 1924 that consular officers were instructed to also ensure that aliens seeking visas met the qualitative and quota requirements for immigrant

admission before visa issuance. Although presentation of a visa was (and is today) required of most aliens, the final determination as to whether an alien met the requirements and was admissible remained -- as it does today -- with the immigration inspector at the port of entry.³²

As to its position within the Department of State, the Bureau of Consular Affairs is one of 17 geographic and functional bureaus.³³ The Department of State identifies itself as "the lead institution for the conduct of American diplomacy."³⁴ Based thereon, the Department's mission statement, as set out in its strategic plan, emphasizes and underscores its role in developing and coordinating U.S. foreign policy and representing U.S. interests to foreign governments and in international organizations.³⁵ While included in the mission statement, adjudication of visas and assistance to U.S. citizens abroad, the tasks carried out by the Consular Affairs Bureau, concern administration of U.S. laws with respect to private individuals. Thus, the responsibilities of the Bureau of Consular Affairs are distinguishable from and stands to the side of the Department's primary foreign policy mission.

In terms of structure, the Bureau is divided along functional lines into three offices. First, the Visa Office oversees the issuance of immigrant and nonimmigrant visas by consular officers at U.S. embassies and consulates abroad. Next, the Office of

Overseas Citizens Services assists consular officers in providing a broad range of services to U.S. citizens, from issuing emergency passports and registering births of U.S. citizens abroad to helping locate abducted U.S. children. Lastly, the Passport Office issues U.S. passports to citizens inside the U.S.³⁶ Finally, it should be noted in this context that the Bureau does not have any responsibility with respect to naturalization of aliens to US citizenship. This is currently an INS benefits adjudication function and would be transferred to the Department of State under the Commission's proposal.

In conclusion, although functioning on the periphery of the Department of State's foreign policy mission, the Bureau of Consular Affairs does have long term experience in administering immigration (but not naturalization) law.

REVIEW OF LITERATURE RELATING TO THE COMMISSION'S RATIONALE

The Commission's rationale for proposing that immigration law enforcement and benefits adjudication be split between the Department of Justice (where immigration enforcement should have equal status with the FBI) and the Department of State is premised on the conclusion that a single agency cannot effectively carry out these conflicting missions. This conclusion is not new. Various study commissions since 1931 have come to this same conclusion and have made the same recommendation.³⁷

These commissions have found that INS places more emphasis on enforcement than adjudication, resulting in denial of benefits to eligible individuals as well as deterring aliens from turning to INS for needed information and advice for fear of being deported.³⁸ Citing these conclusions, a 1980 report of the U.S. Commission on Civil Rights stated:

From the testimony received by this Commission, it is evident that INS officers do, in fact, have an extremely difficult task in striking a proper balance between their duties and responsibilities under each of these functions. Testimony indicates that an overemphasis on enforcement normally occurs.³⁹

The report attributed this overemphasis on enforcement to the INS personnel system which promotes officers with enforcement experience over those who do not and frequently promotes those in enforcement into adjudication positions. "This enforcement experience," the report maintained, "tends to result in an 'enforcement mentality,' which remains with employees even when they are subsequently detailed to 'service' jobs..."⁴⁰

Daniel W. Sutherland of the Center for Equal Opportunity, in a 1996 article advocating separation of the enforcement and adjudication into two agencies, confirms that an enforcement background continues to be a promotion advantage at INS.⁴¹ Mr. Sutherland further contends that "The enforcement mentality is taught at the INS's training centers," and that "In the daily battle between these two 'opposite organizational objectives,' the enforcement mentality almost always wins."⁴²

On the other hand, there is also evidence that INS can effectively carry out both functions. This evidence is provided by a 1991 joint Rand Corporation and Urban Institute study analyzing INS implementation of the employer sanction and legalization provisions of the 1986 Immigration Reform and Control Act (IRCA).⁴³ The study found that: "The pairing of sanctions and legalization as the two main elements of IRCA helped even out the historic imbalance between enforcement and service in the INS."⁴⁴ In implementing employer sanctions, INS introduced an element of customer service to its enforcement mission by adopting a regulatory, educational approach in order to induce voluntary compliance from employers. On the benefits adjudication side, INS insulated the massive legalization program (after an uncertain start) from enforcement and carried it out in a humane and relatively efficient manner, demonstrating to its adjudication staff that benefits adjudication "can be an integral part of the agency's work" and enhancing its morale.⁴⁵

Nevertheless, the Rand-Urban Institute study, noting that adjudication "remains the neglected sibling at INS," was not sanguine over the prospects for the improvement flowing from the successful implementation of IRCA becoming institutionalized and permanent.⁴⁶ According to the study, public concern about drugs and criminal aliens has prompted legislation significantly expanding the INS enforcement mission and its connection to other

law enforcement agencies.⁴⁷ In addition, the study found that INS has diverted significant resources and attention from its traditional missions to its expanded drug and criminal enforcement mission to enhance its low status at the Department of Justice. Finally, the study further attributes the "neglect" of benefits adjudication to:

A lack of political support... While Congress has often chastised the INS for case backlogs and poor record-keeping, lawmakers' concern about the INS' service side has produced few legislative results,⁴⁸ reflecting the limited political clout of immigrants.

In order to solve the problem of the deleterious effects of INS' enforcement mentality on benefits adjudication, the Commission proposes that this function be moved to the Bureau of Consular Affairs in the Department of State. Although less than INS, this Bureau has also come in for its share of criticism for being inefficient (taking too long to process applications and forcing applicants to wait in long lines), and for being overly as well as insufficiently enforcement minded and fraud conscious.⁴⁹

In an article in the immigration focused November 1997 issue of the Foreign Service Journal, former Foreign Service Officer Steven Alan Honley wrote that consular officers and the Bureau of Consular Affairs devote considerable attention to fraud and enforcement-related activities.⁵⁰ As foreign travel to the U.S. and the demand for visas increases, so does the incidence of fraud. Noting that about one quarter of the 8 million

nonimmigrant visa applications adjudicated by consular officers in 1996, a quarter were refused, Honley asserts that "for most consular officers, the presumption of 'guilty' until proven 'innocent' is the norm."⁵¹ In conclusion, Honley observed that "Visa fraud will always be a consular concern, and no amount of resources, vigilance and dedication will enable the United States to detect and eliminate it all."⁵²

The nature and depth of consular enforcement mindedness can be illustrated by three cases. First, according to January 15, 1998 news reports, because a consular officer at the U.S. Embassy in Manila was fraud conscious and enforcement minded, five Americans were arrested and plead guilty to fraud charges in connection with obtaining visas and entry into the U.S. with fraudulent documents for over 500 nurses from the Philippines and South Korea.⁵³ Next, a May 1997 instruction from the Department of State to all consular posts indicates that, at least with regard to marriage fraud, consular officers are even more enforcement minded than INS and are frustrated with INS' unwillingness to pursue suspected fraud cases.⁵⁴ Third, a very recent Federal District Court case in Washington, DC, concerning the dismissal of consular officer, found that U.S. consulates routinely develop and apply fraud and eligibility profiles which an individual applicant who happens to fit such a profile is hard pressed to overcome.⁵⁵ Thus, consular officers are indeed

enforcement minded, sometimes more so than INS, and this can and does result in denial of visa benefits to eligible aliens.

REACTIONS TO THE COMMISSION'S RESTRUCTURING PROPOSAL

Turning now to the reactions of the federal government and noted U.S. immigration experts to the Commissions' proposal, the review laid out below shows that, on balance, there is broad agreement that INS has structural problems but little support for the specific proposal.

It should be noted at the outset that the Commission itself did not speak entirely with one voice on this issue. Warren R. Leiden, one of the nine commissioners on the Commission, appended a separate statement to the final report in which he agreed that restructuring was needed and that benefits adjudication and enforcement should not be handled by the same agency.⁵⁶ However, instead of giving all benefits functions to the Department of State, the functions should be performed by two separate agencies within Justice. The Justice Department, he maintained, has the necessary expertise and experience to do both fairly and effectively. The Department of State, on the other hand, Leiden asserted:

would be undertaking an entirely different mission. Historically, immigration and consular matters have received tertiary attention and status at the Department of State. While some argue that the Department of State could, and should, adopt an entirely new mission in the post-Cold War era, it is a great risk to take. The Department of State has not had experience with the large volume of substantive

adjudications that hereto fore have been done by the Department of Justice.⁵⁷

With regard to outside reactions to the proposal, they began even before the final report was issued at the end of September. Having obtained a draft copy of the Commission's final report, Eric Schmitt of The New York Times reported on August 5, 1997, that there appeared to be bipartisan support in Congress for the proposal to reorganize immigration policy implementation along functional lines and a mixed reaction from immigration experts. On the other hand, the Department of Justice and INS, according to Schmitt, were opposed to the proposal and emphasized that "enforcement functions and benefits functions really do work hand in hand."⁵⁸ The State Department had no comment. INS officials further opined that the proposal did not take account of the Service's improved performance in recent years. Further, Demetrios G. Papademetrious, a senior associate and immigration expert at the Carnegie Endowment for International Peace, was reported to have characterized the proposal as sending "an orphan agency from one department to another" and to favor instead the creation of a new independent agency for immigration.⁵⁹

The Times followed-up with an editorial on August 10th opposing the recommendations in form and substance.⁶⁰ It agreed with Justice that the benefits adjudication function cannot be separated from enforcement as questionable cases need to be investigated. Further, "The State Department is not equipped for

this sort of work, which would be largely inside the United States," the Times declared. Noting that the INS "has been a calamity" and "exceptionally inept," the Times opined that that INS' failure is more attributable to "chronic under funding" than to "enforcement minded culture." With its budget doubled to \$3.1 million and some improvement in its performance since 1993, the Times concluded that "it is too soon to give up on the I.N.S."

Writing in late August, Gene McNary, INS Commissioner from 1989 to 1993, blasted the Commission's proposal as "short-sighted, unfair" and "little more than a tantrum-like reaction to undeniably serious problems." McNary agreed that the current structure of INS is by and large the root cause of its failure. But he did not agree that the structural problems are caused by mission conflict and overload.⁶¹

In McNary's view, the organizational and management failures which have led to poor performance are caused by the micro-management of INS by an uninterested Justice Department and a basically uninformed Congress which has enacted four major immigration law reforms in the last 17 years containing "many ill-conceived provisions."⁶² In fact, McNary contended, breaking up INS would worsen, not solve, the nation's immigration problems. Further, he declared, "The State Department does not like immigration, does not want to be a part of it, and at every opportunity divests itself of immigration responsibility."⁶³ It

would be more logical, he maintained, to move State's visa processing responsibilities to INS' overseas offices.

The solution to INS' structural problems, according to McNary, is not to break it up but rather to turn it into an independent agency reporting directly to the President on the model of the Environmental Protection Agency. This, he asserted, would give INS the political visibility and clout not only to carry out its mission but to put its expertise to good use in shaping it.⁶⁴

The mixed reviews continued after the report was actually issued on September 30th. On the pro side, Kentucky Congressman Harold Rogers, a long-time INS critic and chairman of the House Appropriations subcommittee handling the agency, came out in favor of the Commission's proposal. He agreed that INS has too many missions, namely that it "cannot control our borders, process immigrants and safeguard U.S. citizenship."⁶⁵

On the contra side, Jeanne A. Butterfield, executive director of the American Immigration Lawyers Association, was skeptical that the Department of State could do a better job than INS:

we know that they are opposed to review of their decisions, have no mechanisms in place to assure due process of law and are ill equipped to deal with the volume and complexity of cases that I.N.S. must adjudicate on a daily basis.⁶⁶

In another opposing position, the National Immigration Forum, an immigrant advocacy organization, found the restructuring proposal to be "'too risky'", particularly transferring all benefits

adjudication to the State Department, and suggested consideration of the independent agency option.⁶⁷

Finally, rounding out this review of reactions, Eric Schmitt of the Times again reported on the proposal on January 24, 1998, this time addressing the expected position of the White House.⁶⁸ Schmitt report that, according to an anonymous White House official, the Clinton Administration would reject the Commission's proposal to dismantle the INS. The Administration would, however, submit to Congress by April 1, 1998, a detailed reorganization plan aimed at clarifying INS' enforcement and adjudication missions in response to a request from the House Appropriations Committee.

Further, Schmitt reported, the White House official indicated that numerous government officials and independent groups consulted by the Domestic Policy Council were in favor of reform but opposed to the Commission's plan. In this consultation process, the Department of State had "argued that it was already absorbing the Arms Control and Disarmament Agency and the United States Information Agency."⁶⁹ INS Commissioner Meissner, along with Attorney General Reno, had "vociferously opposed any proposal to abolish the agency" maintaining that, based on its recent substantial reform achievements, INS "deserved a chance to clean its own house."⁷⁰

ASSESSMENT OF THE MERITS OF THE COMMISSION'S PROPOSAL

With the background context laid out above in place, an assessment can now be made of the merits of the Commission's proposal. First, there is a general consensus of opinion among U.S. immigration experts, shared by the President, that there are problems with the U.S. immigration bureaucracy that need to be corrected. This troubled bureaucracy has evolved over time in response to public pressure to increasingly restrict the open immigration policy that characterized the U.S. for its first hundred years. Current U.S. immigration policy, as cited above in the form articulated by the Commission and in the historical context, can be seen as an overlay of the spirit of the traditional open immigration with restrictive measures.

While not expressly so stating, the Commission would appear to believe that operationally this policy implies that, in the traditional spirit of open immigration, the immigration that remains legal, should be maximized and, in accord with the legislated restrictions, that which is illegal should be prevented or minimized. In this sense, U.S immigration policy does indeed contain an internal tension between conflicting goals.

How then does this internal tension between conflicting goals play out in the federal immigration bureaucracy? As set out in the background material given above, INS was established and

immigration duties were given to consular officers to administer the imposition of restrictions on the theretofore open immigration policy. In carrying out this function, INS has long been criticized, even before it was placed in 1940 under the jurisdiction of the nation's premier law enforcement institution, the Department of Justice, for stressing enforcement or prevention of illegal immigration over benefits adjudication or maximization of legal immigration.

This overemphasis on enforcement, it is maintained, has resulted in an institutional enforcement mentality which permeates the entire agency, particularly its personnel policies and despite the internal separation of the two functions into separate branches. This enforcement mentality, the argument continues, is harmful because too often it results in the denial of immigration benefits to eligible aliens, thereby operationally restricting legal immigration more than intended by the law. From this, the Commission concludes that one agency, the INS, cannot do both.

There is, however, evidence to suggest that INS can effectively carry out both mission. As concluded by the Rand-Urban Institute study referred to above, INS did both successfully in implementing the 1986 Immigration Reform and Control Act. In addition, the study based its skepticism that this success would result in permanent change at INS not on an intrinsic mission conflict but on external factors, namely,

Congressional action significantly expanding INS' enforcement mission in drug control and criminal alien deportation (thereby enhancing its law enforcement status) on the one hand and Congressional inaction on improving benefits adjudication on the other. Further, if indeed as the Commission suggests, then problem stems from the different staffing, resources, and work cultures required by enforcement and adjudication, the different staffing and work cultures can be achieved by changing personnel and promotion policies and ensuring that the staff of each is appropriately trained to and rewarded for accomplishing its mission.

Turning to the proposal to place all benefits adjudication in an expanded consular bureau at the Department of State, the Commission apparently assumes that consular officers are not overly enforcement minded and thus more inclined toward maximizing legal immigration. The record set out above, however, demonstrates that consular officers are very much fraud conscious and are also alleged to deny immigration benefits to eligible applicants. Further, while one can agree with the Commission on the intellectual level that enforcement and adjudication do in some sense conflict, the fact that fraud consciousness is fostered in consular work, not carried out under the auspices of a law enforcement institution, would appear to indicate that on the practical level, they are not. Adjudication does involve enforcement in that the adjudicator must determine the

eligibility evidence presented by an applicant is credible. Thus, the view of the Department of Justice noted above that the two missions go "hand in hand," appears to have more operational merit than the Commission's contrary position.

With respect to the Bureau of Consular Affairs also assuming all naturalization responsibilities, as has been brought out above, this would mean taking on a wholly new task and developing expertise in an area of the law with which it has thus far not dealt. In addition, the Department of State has argued that it is already preoccupied with absorbing two additional foreign affairs agencies, implying that it should not at the same time be burdened with expanded immigration duties.

Further, while removing benefits adjudication from the jurisdiction of the Department of Justice would bring its immigration work more in line with its primary law enforcement mission, transferring them to the consular bureau in the Department of State, particularly with regard to naturalization, would arguably distance the bureau even more from the conduct of the Department's foreign policy mission.

Finally, there remains an internal inconsistency in the Commission's proposal to be addressed. The Commission assigns the inspection of entrants at ports of entry to the new Bureau of Immigration Enforcement under the Department of Justice. However, inspection is a benefits adjudication function in that it is a determination as to whether an individual is entitled to

the benefit of legal admission into the US As such, it is currently under the Examinations Branch at INS.

CONCLUSIONS

The Commission, in its own terms, does not present a compelling case for breaking up INS or for transferring all benefits adjudication to the Department of State. Based on the assessment set out above, first, INS' enforcement and adjudication missions do not intrinsically conflict and are in fact related. Second, transferring benefits adjudication to the Department of State will not eliminate enforcement mindedness from the process or necessarily give it higher priority than it has at the Department of Justice. And third, there would appear to be no insurmountable reason that a single agency, such as INS, could not appropriately balance and implement these two mission to minimize illegal immigration on the one hand and maximize legal immigration on the other.

It is, of course, possible that a thorough study of the issue, going beyond the terms of the rationale offered by the Commission and thus the scope of this paper, would prove otherwise. Nevertheless, if separating the enforcement and benefits adjudication fuctions into separate agencies would significantly improve implementation of U.S. immigration policy,

one can only wonder why this has not already been done during the more than sixty years the proposal has been in circulation.

RECOMMENDATION

Despite the lack of a compelling case breaking up INS, the Commission, in conjunction with the other studies discussed above, does make the case that there is a harmful bias favoring enforcement over benefits adjudication at INS. There is also a case for concluding that this enforcement bias stems from its position under the jurisdiction of the Department of Justice. Thus, it would appear more logical to turn INS into an independent agency along the lines of the Environmental Protection Agency as some have suggested. Thus, restructuring may well be the answer to immigration reform - but not the restructuring proposed by the U.S. Commission on Immigration Reform.

Word Count: 5861

ENDNOTES

¹ A National Security Strategy for a New Century (Washington, D.C.: The White House, May 1997), i.

² Russel W. Ramsey, "Analysis of the US-Mexican Border: A Strategic Literature Yet to Come," Parameters 17 (Autumn 1997): 160-161.

³ The report does note the Administration's intention to "cooperate with other states to curb illegal immigration into this country" in the context of humanitarian assistance "to address the economic and social root causes" of mass migration. A National Security Strategy for a New Century, 20.

⁴ William J. Clinton, "Remarks on the Nomination of Doris Meissner to be INS Commissioner and an Exchange with Reporters," Weekly Compilation of Presidential Documents 29 (21 June 1993): 1110.

⁵ See generally, Warren Zimmerman, "Migrants and Refugees: A Threat to Security?" in Threatened Peoples, Threatened Borders, ed. Michael S. Teitelbaum and Myron Weiner (New York: W.W. Norton & Company, 1995), 111-113; Kitty Calavita, "The New Politics of Immigration," Social Problems 43 (August 1996): 284-306, UMI ProQuest, General Periodicals Ondic [CD-ROM], 1996, item 03126664; Victor Gray, "Peoples Wars: Ruminations on Populations and Security," Parameters 27 (Summer 1997) 52-60; and Jack Miles, "The Coming Immigration Debate," The Atlantic Monthly 274 (April 1995): 130-140.

⁶ Jeffrey S. Passel, Illegal Immigration: How Big a Problem? (Washington, D.C.: The Urban Institute, 14 September 1995), 1-3; and "National Forum Talks with Doris Meissner," Phi Kappa Phi Journal: National Forum 74 (Summer 1994): 8-9.

⁷ See for example, "Congressional Report Finds Widespread Problems at INS, Recommends Changes," Interpreter Releases 70 (13 September 1993): 1198-1202.

⁸ Daniel W. Sutherland, "The Federal Immigration Bureaucracy: the Achilles Heel of Immigration Reform," Georgetown Immigration Law Journal 10 (1996): 110-111.

⁹ "Barbara Jordan Appointed to Chair Immigration Reform Commission," Interpreter Releases 70 (20 December 1993): 1669-1670.

¹⁰ U.S. Commission on Immigration Reform, Becoming an American: Immigration and Immigrant Policy (Washington, D.C.: U.S. Commission on Immigration Reform, September 1997), 42-43.

¹¹ Ibid., 43-45.

¹² Ibid., 46, 54-56.

¹³ Ibid., 46-48.

¹⁴ Ibid., 48-52.

¹⁵ Ibid., 52-54.

¹⁶ Frank L. Auerbach, Immigration Laws of the United States, 2nd. (New York: Bobbs-Merrill Company, Inc., 1961), 3-7.

¹⁷ Ibid., 8-9.

¹⁸ Frank D. Bean, Georges Vernez, and Charles B. Keely, Opening and Closing the Doors: Evaluating Immigration Reform and Control (Washington, D.C.: The Urban Institute, 1989), 5-20.

¹⁹ U.S. Commission on Immigration Reform, U.S. Immigration Policy: Restoring Credibility (Washington, D.C.: U.S. Commission on Immigration Reform, September 1994), 3. See also, Bean, 16.

²⁰ Auerbach, 37-38. See also, "This is INS," 17 October 1997; available from <<http://www.ins.usdoj.gov/insideins/245.html#273>>; Internet; accessed 2 December 1997.

²¹ U.S. Department of Justice, United States Department of Justice Strategic Plan 1997-2002, 20 October 1997; available from <<http://www.usdoj.gov/jmd/mps/plan.htm>>; Internet; accessed 2 December 1997.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Milton D. Morris, Immigration - the Beleaguered Bureaucracy (Washington, D.C.: The Brookings Institution, 1985), 92.

²⁷ "This is INS."

²⁸ Ibid.

²⁹ U.S. Commission on Immigration Reform, Becoming an American: Immigration and Immigrant Policy, 49.

³⁰ Auerbach, 40.

³¹ Ibid.

³² Ibid., 41.

³³ U.S. Department of State, "Structure and Organization;" available from <http://www.state.gov/www/about_state/dosstruc.html>; Internet; accessed 11 February 1998.

³⁴ U.S. Department of State, U.S. Department of State Strategic Plan, 30 September 1997; available from <http://www.state.gov/www/global/general_foreign_policy/97dossipa.html>; Internet; accessed 2 December 1997.

³⁵ Ibid.

³⁶ "The Role of the State Department in Migration Issues: A Structural-Functional Analysis of Headquarters," in Organizational Roles, Relationships and Accountability, U.S. Commission on Immigration Reform Staff, briefing book for commissioners, Washington, D.C., Chapter 7, 6-8.

³⁷ U.S. Commission on Civil Rights, The Tarnished Golden Door, Civil Rights Issues in Immigration (Washington, D.C.: U.S. Government Printing Office, 1980), 41-42.

³⁸ Ibid.

³⁹ Ibid., 41.

⁴⁰ Ibid., 41-42.

⁴¹ Sutherland, 119-120.

⁴² Ibid., 119.

⁴³ Jason Juffras, Impact of the Immigration Reform and Control Act on the Immigration and Naturalization Service (Washington, D.C.: The Urban Institute, 1991). See also, Charles Gordon, "An Overall View of the Implementation of the Legalization Program by INS," Georgetown Immigration Law Journal 2 (1988): 517-525.

⁴⁴ Juffras, 75.

⁴⁵ Ibid., 76.

⁴⁶ Ibid., 75.

⁴⁷ Ibid., 31-44.

⁴⁸ Ibid., 6.

⁴⁹ Morris, 88, 96-98.

⁵⁰ Steven Allan Honley, "Visa Dreams: For Consular Officers, Passport and Visa Fraud Looms as Larger Threat," Foreign Service Journal 74 (November 1997): 36-41.

⁵¹ Ibid., 36-37.

⁵² Ibid., 41.

⁵³ Katharine Q. Seelye, "U.S. Breaks Up Ring that Smuggled Nurses," New York Times, 15 January 1998, sec. A, p. A1, A14.

⁵⁴ "State Dept. Outlines Procedures on Tracking I-130's to Prevent Marriage Fraud," Interpreter Releases 74 (23 May 1997): 863.

⁵⁵ Philip Shenon, "Judge Denounces U.S. Visa Policies Based on Race or Looks," New York Times, 23 January 1998, sec. A, p. A1, A9.

⁵⁶ U.S. Commission on Immigration Reform, Becoming an American: Immigration and Immigrant Policy, 63.

⁵⁷ Ibid., 64.

⁵⁸ Eric Schmitt, "U.S. Study Panel Recommends Plan to Break Up I.N.S.," New York Times, 5 August 1997, sec. A, p. A1.

⁵⁹ Ibid., p. A15.

⁶⁰ "Salvaging the I.N.S.," New York Times, 10 August 1997, sec. 4, p. 14.

⁶¹ Gene McNary, "No Authority, No Accountability: Don't Abolish the INS, Make It an Independent Agency," Interpreter Releases 74 (25 August 1997), 1281.

⁶² Ibid., 1286-1287.

⁶³ Ibid., 1288.

⁶⁴ Ibid., 1288-1290.

⁶⁵ Robert Pear, "Panel Urges That Immigrants Become Further Americanized," New York Times, 1 October 1997, sec. A, p. A20.

⁶⁶ Ibid.

⁶⁷ "Out of Many, One: Commission on Immigration Reform Issues Final Report," Interpreter Releases 74 (6 October 1997): 1513.

⁶⁸ Eric Schmitt, "White House Will Reject Advice to Abolish Immigration Service, Officials Say," New York Times, 21 January 1998, sec. A, p. A14.

⁶⁹ Ibid.

⁷⁰ Ibid.

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